

## **H.R. 3551, the “Federal Merit System Reauthorization Act” Section by Section**

**Section 1. Short Title.** The Act may be cited as the “Federal Merit System Reauthorization Act of 2007”

**Section 2. Authorization of Appropriations.** Reauthorizes the Office of Special Council (OSC) and the Merit Systems Protection Board (MSPB) for 3 years.

**Section 3. Allegations of Wrongdoing Against the Special Counsel or the Deputy Special Counsel.**

This section would establish an external investigation by the President’s Council on Integrity and Efficiency (PCIE) when an OSC employee files a prohibited personnel practice violation against an OSC official. PCIE’s findings would be forwarded to the President to decide the appropriate action, if any. The PCIE, established by Executive Order in 1992, was formed to address integrity, economy and effectiveness issues that transcend individual Government agencies, and increase the professional and effectiveness of Inspector General Personnel throughout the Government.

In 2006, Government Accountability Office (GAO) reported on the redress options available to OSC employees who might want to file a prohibited personnel practice allegation against OSC.<sup>1</sup> GAO noted that while OSC employees can file a complaint with OSC in the same fashion as an individual from outside the agency, OSC employees do not have an external independent agency, such as OSC, to represent them. This becomes a problem when an OSC employee raises an allegation against the Special Counsel or the Deputy Special Counsel. Addressing such an allegation within OSC becomes unworkable because all OSC employees ultimately report to the Special Counsel and the Deputy Special Counsel, who has historically had a confidential relationship with the Special Counsel.

The process described under this section is currently being used to investigate personnel violations that have been brought against the sitting Special Counsel. It does not eliminate an OSC employee’s current access to MSPB for a due process hearing or for a direct appeal under section 7701; nor an Individual Right of Action under section 1221 if the PCIE does not provide requested relief within 120 days.

**Section 4. Discrimination on the Basis of Sexual Orientation Prohibited.**

This section clarifies the scope of protection under Section 2302 (b)(10) of Title 5 USC by prohibiting any federal employee who has authority to take, direct others to take, recommend, or approve any personnel action, from discriminating for or against any federal employee or applicant for federal employment on the basis of sexual orientation.

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<sup>1</sup> GAO, *U.S. Office of Special Counsel: Selected Contracting and Human Capital Issues*, GAO-06-16 (Washington, D.C.: Nov. 17, 2005).

Section 2302 (b)(10) of Title 5 USC prohibits discrimination against a federal employee or applicant on the basis of off-duty conduct that does not affect job performance. This has been interpreted by the Office of Personnel Management, the Department of Justice's Office of Legal Counsel, the White House, and the previous Special Counsel to include sexual orientation. However, OSC now interprets Title 5 as protecting employees from discrimination based on sexual conduct, but not discrimination based on one's status related to that conduct.

## **Section 5. Merit System Protection Board Procedures.**

(a) Proof of Exhaustion for Individual Right of Action. This provision codifies unequivocal congressional intent in the 1994 amendments (Cong. Rec. House, Daily ed. H11422 (Oct. 7, 1994) that has been defied by the Federal Circuit and MSPB. (*Serro v. MSPB* 95 F3d 1569, 1577-78 (Fed. Cir. 1996)). The amendments stated that in order to verify OSC exhaustion for an Individual Right of Action, an employee must only identify the precise personnel actions at issue in the initial complaint to the Office of Special Counsel and verify that the Special Counsel has not provided relief after the complaint was pending for 120 days.

There are no prerequisites for an Individual Right of Action beyond those specifically listed by statute. The full scope of the retaliation and the responsible official are often not exposed until after the initial depositions and document reviews. In order to qualify for a due process hearing, there is no prior requirement to have submitted an exhaustive list of protected activity with the Special Counsel beyond what is necessary to establish jurisdiction for OSC to open an investigation.

### (b) Individual Requests for Stays.

This provision states that if an administrative judge denies a stay request the employee may submit an interlocutory appeal for expedited review by MSPB.

Since 1978, the process for aggrieved employees to obtain temporary relief from MSPB has not been implemented as intended. In practice, Administrative Law judges deny stays of alleged prohibited personnel practices which are not granted unless the Special Counsel petitions the full board for temporary relief. If an employee petitions the MSPB administrative judge and the stay is denied, the employee must wait until the full Board issues a final ruling before it decides on the appeal of the stay. This could take several years.

### (c) Joining Subsequent and Related Claims with Pending Litigation.

This provision would halt the current practice of requiring an employee to return to OSC for every personnel action that occurs after filing an initial complaint, when subsequent actions are connected to the same protected activity.

### (d) Procedural Due Process.

This provision follows the National Labor Relations Board (NLRB) model for procedural due process.

MSPB Administrative Judges have discretion over what matters are discoverable, the scope of issues to be heard, and what witnesses and evidence will be permitted at the hearing. That authority, combined with MSPB's rules providing for shortened time frames for filing discovery requests and motions, and the truncated 120-day process, make it difficult for parties to engage in meaningful discovery or litigation. The NLRB follows the federal Rules of Civil Procedures as practicable. The Committee intends that merit system administrative adjudications have the same standards.

(e) Attorney Fees.

Under this provision, attorney's fees shall be compensated if an employee asserts the right to challenge a prohibited personnel practice and substantially prevails. Attorney's fees shall not be denied merely because they are not included in an MSPB order or because an agency asserts that the associated legal action was not relevant.

The provision codifies unequivocal legislative history in the 1994 amendments (H.R. 103-769, at 25) that has not been followed by the Federal Circuit Court of Appeals and MSPB. Often litigation is the indirect, but highly relevant or even decisive, reason that an agency provides the relief sought by an aggrieved employee. This can occur through settlement or relief obtained during proceedings before the Office of Special Counsel, or when an agency takes allegedly independent actions that make the alleged prohibited personnel practice moot, such as canceling a reorganization and its associated personnel actions. Unfortunately, the cost of associated attorney fees can prevent the employee from being made whole, or even create crippling financial consequences more severe than the original retaliation. However, the Federal Circuit and Board have rejected payment of attorney fees for relief unless it is ordered as part of litigation. *See Brickwood Contractors, Inc. v. United States*, 288 F. 3d 1371 (Fed. Cir. 2002) and *Sacco v. Department of Justice*, 317 F. 3d 1384 (Fed. Cir. 2003); *Cole v. Department of Justice*, 90 MSPR 627 (2001); *Nichols v. Department of Air Force*, 94 MSPR 17 (2003), *Arnold v. Department of Air Force*, 94 MSPR 17 (2003) and *Mulero-Echeverria v. Office of Personnel Management*, 93 MSPR 154 (2002).

This provision responds to those decisions in which MSPB and the U.S. Federal Circuit Court of Appeals and any other court or agency interpreting the term "prevailing party" have applied the ruling of the U.S. Supreme Court in *Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed

**Section 6. Office of Special Counsel Procedures.**

(a) Investigations of Alleged Prohibited Personnel Practices.

This provision provides that detailed regulation be prescribed by the Special Counsel to insure that it adheres to responsible professional standards when investigating complaints. Regulatory standards should conform to the PCIE's "Quality Standards for Investigations," and especially sections dealing with "due professional care," "execution," "reporting," and "information management."

Currently, there are not public regulations governing OSC's conduct of its investigations. This precludes any accountability for development of the factual record. OSC complainants have reported that they have been unable to communicate with OSC staff, or even receive acknowledgement of evidence or other information such as suggested witnesses to substantiate their cases.

*(b) Mandatory Communications with Complainants.*

These provisions are intended to improve customer service at OSC. They address repeated complaints by frustrated federal employees that they have not been heard, and that their cases have been closed on mistaken grounds that could have been prevented with minimum levels of professional communications.

*(c) Qualifications of Special Counsel.*

This provision requires that individuals nominated for the position of Special Counsel have a record that reflects a commitment to the federal government's merit system.

*(d) Office of Special Counsel Alternative Disputes Resolution Program.*

This provision mandates that OSC establish an alternate dispute resolution office in the District of Columbia, and that complaints may seek constructive resolution as an initial alternative to an adversary investigation to resolve their cases.

*(e) Substantial Likelihood Determinations.*

OSC has noted that no Special Counsel can meet the 15-day case processing time limit for whistleblower disclosures, and those cases have become more complex in recent years. Therefore, OSC has requested that the case processing time be extended from 15 to 45 days.

Under this provision, the OSC must demonstrate to the whistleblower that it understands the full scope of allegations by allowing the whistleblower to review the language referring the allegation to the agency.

OSC does not inform whistleblowers when it changes how allegations of wrongdoing are framed under a "substantial likelihood" determination. This results in unnecessary mistakes. For example, this may lead to investigation of charges an employee did not make.

(f) Determination of Statutory Requirements Met.

This section clarifies the requirement that the Special Counsel must make a determination whether agency reports on whistleblower disclosure meet the minimum requirements of the Whistleblower Protection Act.

In response to congressional inquiries, Special Counsel Bloch wrote that “in numerous cases” the Special Counsel has been unable to determine if an agency’s report reasonably addressed the whistleblower’s concerns. Yet, the statute requires that the Special Counsel “shall” make this determination. The Special Counsel has no lawful, discretionary authority to defy this statutory requirement.

(g) Public and Internet Access for Agency Investigations.

This section mandates that OSC publish on its website the whistleblower disclosures referred for agency investigation, the ensuing agency reports, the whistleblower allegation reports, and OSC findings.

While it is already required that this information be made public, OSC requires that individuals schedule an appointment at its offices in the District of Columbia to access the information.

**Section 7. Reporting Requirements.** This section increases reporting requirements for both OSC and the MSPB in addition to requiring OSC to survey individuals who make whistleblower disclosures to OSC.